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IN THE

Supreme Court of the United States

October Term, 1962

No. 296

WILLIAM A. REILING,

Petitioner,

vs.

BYRON H. HAMMERSTEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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vs.

BYRON H. HAMMERSTEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the opinion and decision of the Supreme Court of the State of Minnesota, made and entered March 23, 1962, and the order denying reargument and rehearing and the judgment made and entered pursuant thereto on June 6, 1962, in the above-entitled case, wherein it was entitled *Byron H. Hammersten, Respondent, vs. William A. Reiling, Appellant.*

CITATION TO OPINION BELOW

The report of the opinion and decision rendered in the Supreme Court of the State of Minnesota is to be found in 115 N.W. 2d 259, March 23, 1962; — Minn. —, Rehearing Denied June 6, 1962. A copy of said opinion is appended hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Minnesota was entered on March 23, 1962. Rehearing was denied June 6, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether the First Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States prohibits an action for libel by a candidate for public office in a community against a citizen and resident of that community based on a written pamphlet distributed within that community only.

2. Whether the Seventh Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States prohibits the Minnesota Supreme Court from making a finding of a material fact not contained in the evidence submitted to the jury and basing its decision and judgment in part upon such a fact.

3. Whether the Seventh Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States prohibits the Minnesota Supreme Court from requiring the petitioner to accept a reduction in verdict without granting the petitioner a new trial over the objection of the petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

The Amendments to the Constitution of the United States which are involved are:

1. "Article I.

   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

2. "Article VII.

   In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

3. "Article XIV.

   Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

William A. Reiling, the petitioner, was a long-time resident of Roseville, Ramsey County, Minnesota, a community of 24,000 persons. Reiling's formal education consisted of grade school and two years of high school. (Record, p. 196, ff. 1-2) He is a contractor and has built houses in Roseville. Reiling and the plaintiff, Byron H. Hammersten, had been friends prior to the time when Hammersten was appointed and subsequently elected to the office of Village Clerk. They remained friends until the time when Reiling claimed that there were improper actions taken on the part of the Village Council. Neither Reiling nor Hammersten claimed that any personal animosity existed between them; rather their differences were related to the activities of the Village Council of Roseville. (Record, pp. 76, 77, 78, f. 1; p. 136, ff. 2-3)

In November 1958, Reiling printed and published an article which made reference to Hammersten. Reiling distributed about 1,600 to 2,000 copies of this article within the Village of Roseville about a month before the December 2, 1958, election. (Record, pp. 94, ff. 2-3; 95, f. 3) Hammersten was a candidate for the office of Village Clerk of Roseville at that time. (Record, p. 30, f. 1) The article is as follows:

> "A VOTE FOR MR. HAMMERSTEN IS A VOTE FOR ROTTEN GOVERNMENT
>
> Are Connivers and Real Estate promoters running Roseville to enrich themselves at the expense of our tax-paying citizens?
>
> A bank robber gives his victim a hearing before he robs him. The Village Council refuses to give its citizens a hearing while stealing the value of their property by rezoning adjacent property for the benefit of Connivers and Real Estate promoters.

The 1952 Council, like thieves, sneaked through a rezoning of property for the benefit of Mr. Krannak without notifying the interested property owners. It was not surprising that this sneak method was followed, when it was discovered that the Council was to receive $1600.00 to betray the citizens. Mr. Wormsbecker was expected to pay $800.00 of this bribe.

Mr. Krannak sued me for $50,000.00 as a bluff to fool the people, because I dared expose the corruption of the Village Council.

In 1955, the property on Lexington near Garden was rezoned in spite of the fact that the Engineer, the Planning Board, and the citizens opposed it. The Council showed its contempt for the rights of the citizens.

It appears in 1958 that the Three Musketeers, Mr. Hammersten, Mr. Membrez and Mr. Loftsgaarden, control a stoogie Council, Mayor Cedarholm, Mr. Brennan and Mr. Carlson, and to show their power and utter contempt for the citizens of Roseville, without notice to adjacent property owners, the property on Garden and Lexington, on Dionne and Lexington, and on Dionne and Dunlap was rezoned for the benefit of the Connivers and Real Estate promoters.

A Village Law was passed in 1952 that all parties wishing to rezone property must produce an abstract showing that 50% of property owners must favor such rezoning before the Council would grant same.

A Village Law denying property owners to build unless streets was properly graded and black-topped, repeated promises and statements made by Council that no sneaked rezonings would take place, that all people interested in proposed rezonings would be notified and a hearing would be held.

All these laws and promises were deliberately violated by our Stoogie Council so that the Three Musketeers could grant special favors to the Connivers and Real Estate Promoters.

Roseville hires an Attorney, Mr. Loftsgaarden, to protect its citizens. Today the citizens of Roseville would be more honorably represented if they hired a monkey as Village Attorney.

At the Village Council in 4-21-53, Mr. Loftsgaarden stated that 'the rezoning of property for business would devaluate adjacent property to the extent of $5000.00 per unit in the resale of their homes and that the property owners came to live in peace in Roseville and it was the duty of the Village Council to protect them.' Apparently Mr. Loftsgaarden has buried these high ideals, since with his help, the Council rezoned the above 3 pieces of property without even giving the adjacent property owners a hearing, whether they lost $5000.00 or $10,000.00 was no concern to him just as long as the Connivers and Real Estate promoters profited by it.

At the Village Council in 2-3-53, Mr. Hammersten stated that 'he sends cards to all property owners who live within 250 ft. from property requested rezoning.' When the Village Council rezoned the above 3 properties and sneaked through these rezonings without notifying adjacent property owners, it is proof that the clerk, Mr. Hammersten, deliberately misrepresented the citizens, deliberately makes statements that are not true so as to grant special favors to the Connivers and Real Estate promoters.

Don't let the Racketeers run Roseville, elect a Clerk who represents all the citizens instead of a few Connivers.

—William A. Reiling"

Reiling had published a similar article in about 1952. (Record, pp. 111, 112, 113, 114) In about 1955 or 1956, Hammersten claimed Reiling had called him a "son of a bitch" in a conversation. (Record, p. 44, f. 1) Reiling denied making such a statement. (Record, p. 195, f. 3) About

1952, Reiling had published other articles referring to persons other than Hammersten. (Record, pp. 120, 121, 122, 123, 127) These facts were submitted to the jury over the objection of Reiling's attorney by the trial court.

The only evidence as to Reiling's wealth in the record is that he had an interest in three pieces of real estate in St. Paul, Minnesota, with no evidence as to their value. (Record, pp. 127, f. 3; 128, ff. 1-3; 129, ff. 1-2) Hammersten's attorney in the final argument, however, stated: "He [Reiling] stated on the stand his net worth was over one hundred thousand dollars, * * *." (Record, p. 226, f. 3) There is no evidence of such a statement by Reiling in the Record.

The jury returned a verdict of $20,000.00 against Reiling: $12,500.00 general damages and $7,500.00 punitive damages.

The case was appealed to the Minnesota Supreme Court and on March 23, 1962, that Court, in its opinion, ordered a new trial unless Hammersten consented to a reduction of verdict in general damages from $12,500.00 to $5,000.00, which he subsequently did. The Court affirmed the $7,500.00 punitive damages verdict, stating: "Here, where the defendant admitted a net worth of $100,000.00, the award of $7,500.00 as punitive damages for his publication of the article designed to damage, if not destroy, plaintiff was not so excessive in our opinion as to be unreasonable." There was no such evidence. However, in oral argument before the Minnesota Supreme Court, Reiling's attorney stated that he had, prior to trial, at the time Mr. Reiling's deposition was to be taken, offered to stipulate that Reiling was worth $100,000.00, provided that Hammersten's attorney would not introduce any evidence as to that issue. This offer was not accepted.

A petition for rehearing was filed in the Minnesota Supreme Court and the Court was asked to rule on the United States

Constitutional issues raised therein. This petition is appended hereto. The Minnesota Supreme Court denied a rehearing without specifically stating that it had ruled on the constitutional questions raised in the petition. The Court's order is appended hereto.

It is respectfully suggested to this Court that Reiling has properly raised issues relating to the First, Seventh and the due process clause of the Fourteenth Amendments to the Constitution of the United States and that the Minnesota Supreme Court has, by its order denying a rehearing, determined that Reiling's rights thereunder were not violated.

REASONS FOR GRANTING THE WRIT

The decision below has decided federal questions of substance probably not in accord with the opinion of this Court and in conflict with the opinion expressed by Justice Hugo L. Black on April 14, 1962, as set forth in the New York University Law Review, Vol. 37, June, 1962, No. 4, p. 557.

1. The First Amendment and the Due Process Clause of the Fourteenth Amendment Prohibits a Libel Suit.

Justice Black, in his appearance on April 4, 1962, at the biennial convention of the American Jewish Congress held in New York City, stated, in response to a question from Professor Cahn, the following:

> CAHN: "Do you make an exception in freedom of speech and press for the law of defamation? That is, are you willing to allow people to sue for damages when they are subjected to libel or slander?"

JUSTICE BLACK: "My view of the First Amendment, as originally ratified, is that it said Congress should pass none of these kinds of laws. As written at that time, the Amendment applied only to Congress. I have no doubt myself that the provision, as written and adopted, intended that there should be no libel or defamation law in the United States under the United States Government, just absolutely none so far as I am concerned.

"That is, no federal law. At that time—I will have to state this in order to let you know what I think about libel and defamation—people were afraid of the new Federal Government. I hope that they have not wholly lost that fear up to this time because, while government is a wonderful and an essential thing in order to have any kind of liberty, order or peace, it has such power that people must always remember to check them here and balance them there and limit them here in order to see that you do not lose too much liberty in exchange for government. So I have no doubt about what the Amendment intended. As a matter of fact, shortly after the Constitution was written, a man named St. George Tucker, a great friend of Madison's, who served as one of the commissioners at the Annapolis Convention of 1786 which first attempted to fill the need for a national constitution, put out a revised edition of Blackstone. In it he explained what our Constitution meant with reference to freedom of speech and press. He said there was no doubt in his mind, as one of the earliest participants in the development of the Constitution, that it was intended that there should be no libel under the laws of the United States. Lawyers might profit from consulting Tucker's edition of Blackstone on that subject.

"As far as public libel is concerned, or seditious libel, I have been very much disturbed sometimes to see that there is present an idea that because we have had the practice of suing individuals for libel, seditious libel still

remains for the use of government in this country. Seditious libel, as it has been put into practice throughout the centuries, is nothing in the world except the prosecution of people who are on the wrong side politically; they have said something and their group has lost and they are prosecuted. Those of you who read the newspaper see that this is happening all over the world now, every week somewhere. Somebody gets out, somebody else gets in, they call a military court or a special commission, and they try him. When he gets through sometimes he is not living.

"My belief is that the First Amendment was made applicable to the states by the Fourteenth. I do not hesitate, so far as my own view is concerned, as to what should be and what I hope will sometime be the constitutional doctrine that just as it was not intended to authorize damage suits for mere words as distinguished from conduct as far as the Federal Government is concerned, the same rule should apply to the states.

"I realize that sometimes you have a libel suit that accomplishes some good. I practiced law twenty years. I was a pretty active trial lawyer. The biggest judgment that I ever got for a libel was $300. I never took a case for political libel because I found out that Alabama juries, at least, do not believe in political libel suits and they just do not give verdicts. I knew of one verdict given against a big newspaper down there for $25,000, and the Supreme Court of Alabama reversed it. So even that one did not pan out very well.

"I believe with Jefferson that it is time enough for government to step in to regulate people when they *do* something, not when they *say* something, and I do not believe myself that there is any halfway ground if you enforce the protections of the First Amendment."

In this case, because Reiling was a resident of Roseville publishing an article referring to a candidate for public office in Roseville and distributing the article within the Village of Roseville, there is a qualified privilege. It is respectfully suggested that, under such circumstances at least, there should be an absolute privilege.

We may not agree with what a man says nor the manner in which he states it, but he should have the right to so speak. The people of a community should feel free to express themselves in whatever fashion they choose regarding a candidate or issue in an election without fear of retribution sanctioned by the courts in this great democracy.

2. The Seventh Amendment and the Due Process Clause of the Fourteenth Amendment Guarantee That All Facts Shall Be Determined by a Jury.

When the Minnesota Supreme Court found as a fact that the defendant was worth $100,000.00 and thereby sanctioned the punitive damages award in the sum of $7,500.00, it denied the defendant the right to have this material fact decided by a jury. Reiling's attorney, in oral argument before the Minnesota Supreme Court, stated that there had been an offer to stipulate that the defendant was worth $100,000.00. That such an offer was made several months prior to the jury trial in the District Court. That this offer was not accepted by the plaintiff. That the offer to stipulate was conditioned on the plaintiff making no further inquiries as to defendant's net worth and that plaintiff was to make no attempt to introduce any evidence relating to defendant's net worth. The fact of this unaccepted offer to stipulate as to defendant's net worth was disclosed to the Minnesota

Supreme Court when defendant's counsel was arguing the error of plaintiff's counsel stating in his final argument to the jury that Reiling admitted he was worth $100,000.00. The Record does not disclose such an admission by the defendant, Reiling, because in fact none was made.

Due process should permit attorneys to make offers and counter-offers, whether said offers relate to stipulations as to evidence on a given issue or as to settlement of damages, without fear of prejudicing their client's cause.

3. The Seventh Amendment and the Due Process Clause of the Fourteenth Amendment Guarantee the Defendant a Trial by a Jury Which Is Not Incited to Passion or Prejudice.

The Minnesota Supreme Court reduced the general damages verdict from $12,500.00 to $5,000.00. In so doing, they must have found that the original verdict was arrived at by the jury out of passion and prejudice against the defendant. The plaintiff consented to such a reduction but the defendant objected and asked for a new trial, which request was denied by the Court.

The defendant has a right to a jury determination of the facts under the Seventh Amendment. It is respectfully suggested that due process under the Fourteenth Amendment does not compel the defendant to accept an appellate court's determination of damages in substitution of that of a jury. This is an admitted prevalent practice by appellate courts, but it is suggested that this practice should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Supreme Court should be granted. Oral argument is requested in the event this petition is granted.

Respectfully submitted,

T. EUGENE THOMPSON
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Saint Paul 1, Minnesota
Counsel for Petitioner

July 26, 1962

APPENDIX

(PETITION FOR REARGUMENT FILED)

STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT
ST. PAUL, MINNESOTA

April 27, 1962

BYRON H. HAMMERSTEN, *Respondent*,
vs. 38211
WILLIAM A. REILING, *Appellant*.

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

Application for reargument having been filed herein all further proceedings, except taxation of costs, are stayed pending its determination.

Yours respectfully,

MAE SHERMAN
Clerk Supreme Court

A petition for reargument does not stay taxation of costs and disbursements.

(PETITION DENIED)

STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT
ST. PAUL, MINNESOTA

June 6, 1962

BYRON H. HAMMERSTEN, *Respondent,*
vs. 38211
WILLIAM A. REILING, *Appellant.*

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

MAE SHERMAN
Clerk Supreme Court

STATE OF MINNESOTA
IN SUPREME COURT

File No. 38211

BYRON H. HAMMERSTEN, *Respondent*,

vs.

WILLIAM A. REILING, *Appellant*.

PETITION FOR REHEARING

Petitioner is the attorney for appellant, William A. Reiling.

This Court, on March 23, 1962, filed an opinion affirming the judgment in the lower court provided the respondent, Byron H. Hammersten, consented to a reduction in verdict from $12,500 general damages to $5,000. The respondent has filed his consent to such a reduction, thereby consenting to a reduction in total verdict to $12,500, of which $7,500 is punitive damages and $5,000 is general damages.

The Court, on page 11 of its opinion, states that the appellant admitted a net worth of $100,000 and, therefore, this Court does not find the sum of $7,500 as punitive damages to be unreasonable.

The Record on pages 127, 128 and 129 shows only that the appellant owned, with no value being shown, an interest in real estate located at 475 Summit, 834 Summit, 838 Lincoln, and other property. Nowhere in the Record is there any dollar value as to the worth of the appellant which could be submitted to the jury for its consideration in determining the amount of punitive damages to be set. Therefore, the jury, in establishing the sum of $7,500 as punitive damages, was

clearly acting under undue influence and passion incited by the acts and conduct of counsel for the plaintiff. Counsel for the respondent, in his closing argument, made reference to the fact that the appellant was worth the sum of $100,000.

At the time of the oral argument before this Court, counsel for Mr. Reiling advised the Court that they had offered to enter into a stipulation before trial with the plaintiff to the effect that the defendant had a net worth of $100,000. This offer to stipulate was conditioned upon counsel for the plaintiff not asking any questions regarding property or value owned by the defendant. The plaintiff's attorneys elected not to enter into this stipulation and chose instead to rely on their right to introduce evidence to prove to the jury the defendant's net worth by eliciting testimony from the defendant regarding ownership and value of real estate and other holdings. Respondent failed to establish any dollar value as to the defendant's net worth in the evidence offered on this point.

It is respectfully suggested that this Court reconsider its finding of fact that the defendant admitted a net worth of $100,000, thereby finding that $7,500 punitive damages was not excessive. It is suggested to this Court that the defendant ought not to be bound by an unaccepted offer to stipulate, regardless of the motive of defendant in making said offer. Such an offer is the same as an offer to settle a personal injury action before trial. For example, if a defendant in a personal injury action offered to settle the case for the sum of $15,000 and the plaintiff elected to stand trial and the jury returned a verdict of $1,000, should the plaintiff be entitled to have that verdict set aside on the ground that the defendant had admitted the value of the plaintiff's case to be

not less than $15,000? Why then does the Court find the defendant's worth to be a net of $100,000?

This Court found the general damages, based upon the entire record, to be in an amount of $5,000. The opinion does not state that the Court finds the jury to have arrived at its verdict under passion and prejudice against the defendant, but it is respectfully submitted that this is the basis for the jury verdict and, therefore, the defendant is entitled to a new trial under fair conditions and in compliance with the due process clause of the Fourteenth Amendment to the United States Constitution. The defendant should not be compelled to accept a reduction in verdict on general damages to $5,000. To force the defendant to now accept a reduction in verdict on general damages to $5,000 is to clearly deny the defendant his right to due process in violation of the Fourteenth Amendment to the United States Constitution. It is also urged upon this Court that to deny the defendant his right to trial by jury and to deny the defendant the right to have the facts tried by a jury and not otherwise re-examined by any Court is to deny the defendant his rights under the Seventh Amendment to the United States Constitution.

Appellant intends to file a petition for review by the United States Supreme Court if this petition for rehearing as to a new trial is denied and specifically requests that this Court rule on the United States Constitutional questions herein.

It is further suggested that it is also a violation of the same due process clause of the Fourteenth Amendment to the United States Constitution to compel the defendant to be bound by an unaccepted offer to stipulate as to a material fact, which fact subsequently during trial was not established

by competent evidence and this also is a denial of the defendant's right to have all facts tried by a jury and not otherwise re-examined by any Court in violation of the Seventh Amendment to the United States Constitution.

The plaintiff in the lower court had the burden of establishing malice by the defendant towards plaintiff, and this Court, in its opinion, held the evidence sufficient to support the jury's finding of the issue of malice.

The Court's attention is directed to the Record, pages 76, 77 and 78, wherein Mr. Hammerstein is being examined by Mr. Thompson as follows:

"Q. Prior to your going into village work in Roseville you knew Mr. Reiling, didn't you?

A. Sure.

Q. Mr. Reiling lived in Roseville for many years also, has he not?

A. About ten or twelve I mean.

Q. Prior to that time didn't he live there too?

A. I believe he was born out that way years and years ago.

Q. And the particular property now, do you remember those three pieces we spoke about rezoned in 1958?

A. Yes.

Q. They were right near his home, weren't they?

A. About a block away, one across the street and one within two blocks.

Q. All within the area?

A. Yes.

Q. In that particular area didn't Mr. Reiling develop the homes and sell homes?

A. He built some homes west of the property, yes.

Q. So in that particular area he had in the past built some homes and he himself lived there?

A. Yes.

Q. And people to whom he had sold the homes lived there?

A. Yes.

Q. Prior to your going into government service you were acquainted with Mr. Reiling when you were in the sign painting business, isn't that correct?

A. Yes.

Q. As a matter of fact you and Mr. Reiling were on friendly terms, were you not?

A. Yes.

Q. And as a matter of fact you had done work for him and you considered each other as friends?

A. Correct.

Q. And this continued on even after you were elected, isn't that true?

A. That is right.

Q. And where he started to criticize you was when you started as a village official?

A. That is right.

Q. Due to certain acts which he felt were improper and he told you about them, didn't he, such as not giving rezoning notice to the people that he felt they had a right to it?

A. I believe he made that statement at one time or the other.

Q. This spirit shall we say of friendliness existed up until the time that Mr. Reiling claimed that there was improprieties going on by virtue of certain actions of the council?

A. Yes.

Q. And of you likewise?

A. Yes.

Q. As far as personal animosity, however, he still doesn't have any personal animosity toward you, does he?

A. I don't know.

Q. Do you have any toward him?

A. No, sir, toward no one.

Q. It is merely because he published the statements regarding your activities as a councilman, is that correct?

A. Yes.

Q. And upon an analysis of the entire article he is criticizing not only you but he is criticizing the procedure employed by the council of the village of Roseville during certain periods, isn't that correct?

A. Yes."

and to the Record on page 136 wherein Mr. Reiling is being examined by Mr. Thompson as follows:

"Q. You have Exhibit D in front of you?

A. Is that the yellow one?

Q. Yes, that is the one in question, the one attached to the complaint marked Exhibit A; that was distributed to the villagers or to the people in Roseville, was it not?

A. Yes, sir.

Q. And you published that as a citizen of Roseville, did you not?

A. Yes, sir.

Q. And what was your purpose in publishing it?

A. The purpose was to obtain good government in Roseville.

Q. Do you have any personal animosity towards any of the people named therein?

A. No, sir."

The Record shows that the plaintiff, by his own testimony, refutes any suggestion of malice on the part of the defendant. Malice is essential before any damages can be awarded, puni-

tive or general, where the subject matter of the alleged libel is privileged as it is in this case.

The Record clearly shows that this is a case where a citizen and resident of a community speaks out in a written pamphlet, signed with his true name, against a candidate for public office in the community, not with personal ill will, but because of a strong, compelling, living desire to see justice done in the community. It is urged upon this Court that, under circumstances such as we have here, to punish this defendant by awarding money damages against him is to deny him his right to freedom of speech as guaranteed to him under the First Amendment to the United States Constitution.

The language chosen by the defendant to criticize the plaintiff, while intemperate, was nevertheless language consistent with the defendant's educational background; I refer the Court to the Record, page 196, wherein the defendant is shown to have completed only grade school and two years of high school.

This Court on page 8 of its opinion states that one of the criteria to establish ill feeling between the plaintiff and the defendant can be inferred from evidence that the defendant had called plaintiff "a son of a bitch". It is respectfully suggested that such statement should not be used as a criteria to establish ill will between plaintiff and defendant; rather it should be used as a basis for granting the defendant a new trial and setting aside the verdict of the lower court. The words, not being actionable per se and not imputing the same charge as comprised in the articles alleged to be libelous, should not have been submitted to the jury for its con-

sideration and could only contribute to incite passion and prejudice against the defendant in the minds of the jury.

The Court is respectfully requested to:

(1) Set aside the verdict and grant the defendant a new trial on the issues herein; or, if this be denied,

(2) To state in its opinion that it has considered the United States Constitutional questions contained herein relating to Amendments One, Seven and the due process clause of Amendment Fourteen.

Respectfully submitted,

T. EUGENE THOMPSON

No. 172—Ramsey County Thomas Gallagher, J.
Took no part: Otis, J.; Rogosheske, J.

BYRON H. HAMMERSTEN, *Respondent*,
38211 vs.
WILLIAM A. REILING, *Appellant*.

Endorsed; Filed March 23, 1962
Mae Sherman, Clerk
Minnesota Supreme Court

SYLLABUS

1. In libel action publication of pamphlet wherein plaintiff, member of the village council and village clerk of Roseville, was accused of accepting bribe for procuring enactment of certain zoning ordinances, *held* actionable per se. Published words imputing commission of indictable offense, or which constitute false accusations against public official imputing corruption in office, are actionable per se.

2. While accusations against public official or candidate for public office are prima facie privileged, such privilege does not authorize publication of false and malicious statements charging public official with crimes or misconduct in office. Burden rests upon injured party to establish that publisher was actuated by malice or improper motives.

3. Evidence from which it could be properly inferred that ill feeling existed between plaintiff and defendant because of village rezoning ordinance affecting certain lots adjacent to property owned or developed by defendant, and that defendant was motivated by malice in publication of article accusing plaintiff of acceptance of bribe and other misconduct as a public official, *held* sufficient to support jury's finding on issue of malice.

4. Statement in closing argument by plaintiff's counsel that defendant's counsel would be punished by the jury for insinuating without evidentiary support that plaintiff had been given liquor to influence his vote on rezoning ordinances, *held* not so prejudicial as to require new trial where plaintiff's counsel made it clear that such statement had no reference to the issue of exemplary damages and where trial court correctly instructed jury in detail as to legal principles governing award of punitive or exemplary damages.

5. In libel action punitive damages may be awarded where defamation of character is published with malice or reckless disregard of rights of injured party. Determination of award for such damages rests almost exclusively with jury and its action therein will not be disturbed on appeal, except where award is so excessive as to be deemed unreasonable. *Held*, award of $7,500 as punitive damages for publication of article designed to damage if not destroy plaintiff not so excessive as to be unreasonable.

6. Award of $12,500 for general damages resulting from libelous publication held excessive and to require new trial, unless plaintiff consent that such damages be reduced to $5,000, so that total award equal $12,500.

Affirmed on condition plaintiff consent to reduction.

OPINION

THOMAS GALLAGHER, Justice.

Action for libel. The jury returned a verdict for plaintiff in the total amount of $20,000, of which $12,500 was designated as general damages and $7,500 as punitive damages. This is an appeal from an order of the trial court denying defendant's motion for judgment notwithstanding the verdict or for a new trial. He contends that (1) the article published by him was qualifiedly privileged and that the requisite evidence to establish malice in its publication was lacking; and (2) the verdict was so excessive as to indicate passion and prejudice on the part of the jury.

In November 1958 plaintiff was clerk of the village of Roseville in Ramsey County and a candidate for reelection to this office. He had held the position, which paid a salary of $6,000 per annum, for approximately 8 years. During such time defendant was a resident and property owner in the village.

During November 1958, some 30 days before election, defendant caused to be printed and distributed in Roseville approximately 1,600 to 2,000 copies of a pamphlet in which the following was printed:

"A VOTE FOR MR. HAMMERSTEN IS A VOTE FOR ROTTEN GOVERNMENT

"Are Connivers and Real Estate promoters running Roseville to enrich themselves at the expense of our tax-paying citizens?

"A bank robber gives his victim a hearing before he robs them. The Village Council refuses to give its citizens a hearing while stealing the value of their property by rezoning adjacent property for the benefit of Connivers and Real Estate promoters.

"The 1952 Council, like thieves, sneaked through a rezoning of property for the benefit of Mr. Krannak without notifying the interested property owners. It was not surprising that this sneak method was followed, when it was discovered that the Council was to receive $1600.00 to betray the citizens. Mr. Wormsbecker was expected to pay $800.00 of this bribe.

* * * * *

"Don't let the Racketeers run Roseville, elect a Clerk who represents all the citizens instead of a few Conniver.

"William A. Reiling."

Over defendant's objection, evidence was received that on at least two prior occasions defendant had published and distributed libelous articles of a like nature directed at plaintiff. One such article, published in 1952, set forth the following:

"CORRUPT POLITICS IN ROSEVILLE

"Today Roseville is run for the benefit of corrupt politicians. The citizens are betrayed by fraud and deceit.

"The property on Dunlap and Dionne Streets was rezoned for the benefit of unscrupulous real estate promoters, denying property owners a hearing; like thieves they sneaked through a zoning law to steal the value of our property. Sixteen hundred dollars was to be collected and paid for this service. Mr. Wormsbecker was expected to pay eight hundred dollars of this money. Approximately 200 yards of black dirt was stolen from Dunlap Street. The Village Council knew who the guilty parties were but refused to prosecute them.

* * * * *

"William A. Reiling."

The other article, distributed by defendant shortly before the village election in 1952, contained the following:

"CORRUPT POLITICS IN ROSEVILLE

"Elect men to office who represent the people instead of the racketeers.

"The two men listed below do not represent the people of Roseville.

"Mr. Hammerstein Mr. Willmus

* * * * * *

"Voted to rezone property * * * for the benefit of unscrupulous real estate promoter, denying the people living in the vicinity a right to vote on the matter—destroying the value of their property and ruining their surroundings.

* * * * *

"The Zoning law was passed to protect the citizens who build homes and beautify their surroundings. The Village Council uses the Zoning law to destroy your homes and your surroundings.

"Roseville hires an attorney to protect the rights of its citizens. The Village Council uses the attorney to take unfair advantage of its citizens.

"If you don't want racketeers to run Roseville, elect men to office who represent the people.

"William A. Reiling"

Plaintiff testified that he was nearly 62 years of age and had been village clerk until 1958, at which time he lost the election; that he was the Hammersten referred to in the published pamphlets. He denied all the accusations therein. He testified that in a conversation with defendant in 1955 or 1956 the latter had called him a "son of a bitch"; that since publication of the articles he had been shunned by people in Roseville, specifying a number of times people had avoided him after the publication; and that he had been criticized by some and had suffered mental anguish

because he felt that his reputation had been injured in Roseville, where he resides with his wife and son.

Defendant testified that he made and distributed the publications in the interests of good government and that he had no personal animosity toward plaintiff. However, he failed to submit any evidence establishing the truth of the libelous accusations set forth in the pamphlets described. He testified that his information with respect to the bribe referred to therein had come from a Mr. Ralph W. Wormsbecker. The latter in his testimony failed completely to establish the truth of this charge.

In his closing argument, plaintiff's counsel, in commenting on questions asked plaintiff by defendant's counsel, made the following statement which defendant asserts constituted misconduct of counsel justifying a new trial:

> "• • • Mr. Thompson [defendant's counsel] made two comments in two questions he asked • • •. He asked • • • Mr. Hammersten, • • • did Mr. Krannak ever buy you any drinks on this matter out there? No, I don't drink. Question, did Krannak ever give you anything? Well, now, I say to you this jury is going to punish Mr. Thompson for that, it didn't go over my head, I don't mind him trying a hard lawsuit and he should, but I don't like that insinuation. I remember those words, I hope the jury does. As I say to you, I think the jury will punish him for it, not in any of the damages, but hold it against him for it."

At the time, defendant asked the court to instruct the jury to disregard these remarks, which the court refused.

The trial court charged the jury as follows:

> "If you find that the defendant has proved by a fair preponderance or overweight of the evidence • • • that the statements in the exhibit were true; or that he has

failed to prove them to be true, and has proved that he was justified in making them because he reasonably believed them to be true, and that the exhibit was fair comment concerning the plaintiff as a public officer or as a candidate for public office, then your deliberations will cease and you will return a verdict for the defendant. * * *

"A written or printed publication is libelous if it tends to injure the reputation of another and exposes him to public hatred, contempt or ridicule, or causes him to be shunned or avoided. * * * Under that definition Exhibit D is libelous; but it does not necessarily follow therefrom that the defendant must respond to the plaintiff in damages for the publication.

"Any citizen has a right to comment fairly and with an honest purpose on the conduct of a public official. *The publication of an article concerning a candidate for public office relative to his candidacy is one of public interest and is conditionally or qualifiedly privileged. That means that the publication of Exhibit D was privileged unless actuated by malice, that is, by ill will or improper motive or by acting carelessly and wantonly to the injury of the plaintiff. Malice is not presumed from falsity of a statement so that unless both falsity and malice existed, there is no liability.*

"Malice cannot be established by merely showing that the defendant's purpose was to prevent plaintiff's election. Proof of malice must be made by showing bad faith in the defendant; or that the occasion was made use of as a camouflage behind which to hide for the purpose of maligning a candidate in a way not justified by the facts; or personal ill feeling by evidence beyond the printed words or by the character of the printed words themselves and the mode and extent of the publication and distribution." (Italics supplied.)

With respect to the issue of damages, the trial court charged the jury:

> "* * * If the plaintiff be entitled to recover, he is entitled to reasonable compensation as general damages for his anguish and injuries to his feelings and to his reputation which the evidence shows resulted from the publication. In addition thereto you may, but are not obliged to, award him punitive damages. Punitive damages are those awarded to punish a person for outrageous conduct, that is, with a reckless indifference to the interest of the plaintiff and as an example to discourage the defendant and others from similar conduct in the future. In the assessment of punitive damages you may properly consider the nature of the defendant's conduct, the nature and extent of harm to the plaintiff which the defendant caused or intended to cause; all of circumstances including the motives of the defendant, the relationships between the parties, the provocation or want of provocation of the act and the wealth of the defendant. But punitive damages as well as general damages must be reasonable, fair and just.
>
> "In no event may the plaintiff recover for any special damages nor for any part of the salary which he might have received had he prevailed in the 1958 election."

1. There can be no doubt but that the language used in the article published and distributed by defendant during November 1958, as above described, was actionable per se. Therein plaintiff is accused of accepting a bribe in his capacity as a member of the council of the village of Roseville for procuring the enactment of certain zoning ordinances by

such council. Under Minn. St. 613.07[1] such conduct by plaintiff would constitute a crime. The publication of words imputing the commission of any indictable offense is actionable per se. Larson v. Krostue, 110 Minn. 337, 125 N. W. 262 (slander); Landon v. Watkins, 61 Minn. 137, 63 N. W. 615; Mallory v. Pioneer-Press Co., 34 Minn. 521, 26 N. W. 904. Certainly, the language of the publication could bring plaintiff into the contempt or ridicule of those citizens of Roseville who had occasion to read it and as such the publication would be actionable per se. Gadach v. Benton County Co-op. Assn., 236 Minn. 507, 53 N. W. (2d) 230; Craig v. Warren, 99 Minn. 246, 109 N. W. 231; Byram v. Aiken, 65 Minn. 87, 67 N. W. 807. See, Larson v. R. B. Wrigley Co., 183 Minn. 28, 235 N. W. 393. Further, false accusations made against a public officeholder importing a want of integrity or corruption in office are actionable per se. Fullerton v. Thompson, 123 Minn. 136, 143 N. W. 260; Tawney v. Simonson, Whitcomb & Hurley Co., 109 Minn. 341, 124 N. W. 229; Martin v. Paine, 69 Minn. 482, 72 N. W. 450; Petsch v. Dispatch Printing Co., 40 Minn. 291, 41 N. W. 1034; Annotation, 53 A. L. R. (2d) 8.

2. The accusations here made had reference to plaintiff both as a public official and as a candidate for public office and hence were prima facie privileged. Fullerton v. Thomp-

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[1] Minn. St. 613.07 provides: "Every executive or administrative officer, or person elected or appointed to an executive or administrative office, who asks, receives, or agrees to receive any bribe upon an agreement or understanding that his vote, opinion, or action upon any matter then pending or which may by law be brought before him in his official capacity shall be influenced thereby * * * shall be punished by imprisonment in the state prison for not exceeding ten years, or by a fine of not exceeding $5,000, or by both; and, in addition thereto, he shall forfeit his office, and be forever disqualified from holding any public office under the state."

son, 123 Minn. 136, 143 N. W. 260; Marks v. Baker, 28 Minn. 162, 9 N. W. 678; see, also, Lydiard v. Wingate, 131 Minn. 355, 155 N. W. 212. This privilege is not for the protection of the defendant, but rather in the interests of the promotion of public welfare. Matthis v. Kennedy, 243 Minn. 219, 67 N. W. (2d) 413. But the privileged character of this type of publication does not authorize publication of false and malicious statements charging a public official with crimes or misconduct in office. Fullerton v. Thompson, *supra*; Tawney v. Simonson, Whitcomb & Hurley Co., *supra*; Martin v. Paine, *supra*. In such cases, of course, the burden rests upon plaintiff to establish that the publisher was actuated by malice or improper motives or that he acted wantonly to the injury of the plaintiff. Clancy v. Daily News Corp., 202 Minn. 1, 277 N. W. 264; Friedell v. Blakely Printing Co., 163 Minn. 226, 203 N. W. 974.

3. Here it seems clear that plaintiff submitted sufficient evidence to present a fact issue as to whether defendant was motivated by malice in publishing the article described. That ill feeling existed between plaintiff and defendant, arising out of the rezoning by the village of certain lots adjacent to property owned or developed by defendant, might properly be inferred from evidence that thereafter defendant had called plaintiff a "son of a bitch," and by defendant's publication of two other pamphlets charging plaintiff with dishonesty and criminal conduct as a municipal officer in connection with the adoption of such rezoning ordinances. It is well settled that evidence of the publication by a defendant of articles of similar import to those upon which an action against him for libel is based is admissible to show malice and may be considered by the jury in determining the ques-

tion of punitive or exemplary damages. Larrabee v. Minnesota Tribune Co., 36 Minn. 141, 30 N. W. 458; Gribble v. Pioneer Press Co., 34 Minn. 342, 25 N. W. 710, 12 A. L. R. 1026. Cf. Linnehan v. Sheeran, 150 Minn. 171, 184 N. W. 835; Hansen v. Hansen, 126 Minn. 426, 148 N. W. 457; Reitan v. Goebel, 33 Minn. 151, 22 N. W. 291; Fredrickson v. Johnson, 60 Minn. 337, 62 N. W. 388; Severns v. Brainard, 61 Minn. 265, 63 N. W. 477. See, Annotation, 86 A. L. R. 1297. Further, no evidence was submitted to establish the truth of defendant's charges or to show that he had ever sought to ascertain the truth thereof before publication of the article involved. All the evidence of surrounding circumstances clearly gave rise to an issue relating to defendant's malice, and the jury's determination of this issue adversely to defendant cannot be disturbed here.

4. The statement by counsel for plaintiff in his closing argument that defendant's counsel would be punished by the jury for insinuating without evidentiary support that plaintiff had been given liquor to influence his vote on rezoning ordinances in our opinion was not so prejudicial as to require a new trial. At most it might be implied that the statement related to the punitive or exemplary damages sought by plaintiff, but plaintiff's counsel made it clear at the time that he did not so intend it, and in fact stated specifically that the statement did not have reference to "any of the damages." In addition, he stated, "The Judge will explain the punitive damages." Thereafter the court instructed the jury that:

> "* * * you may, but are not obliged to, award * * * punitive damages. Punitive damages are those awarded to punish a person for outrageous conduct, that is, with

> a reckless indifference to the interest of the plaintiff * * *. In the assessment of punitive damages you may properly consider the nature of the defendant's conduct, the nature and extent of harm to the plaintiff which the defendant caused or intended to cause; all of the circumstances including the motives of the defendant, the relationships between the parties, the provocation or want of provocation of the act and the wealth of the defendant. But punitive damages as well as general damages must be reasonable, fair and just."

Under such circumstances, we doubt that the jury could have been misled on this issue. The granting or denying of a new trial for misconduct of counsel rests almost wholly in the discretion of the trial court, and here we cannot say that in denying defendant's motion therefor the trial court abused its discretion to the extent of requiring a reversal here. Bush v. Havir, 253 Minn. 318, 91 N. W. (2d) 784; Bontang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N. W. (2d) 30; Patton v. Minneapolis St. Ry. Co., 247 Minn. 368, 77 N. W. (2d) 433; Beebe v. Kleidon, 242 Minn. 521, 65 N. W. (2d) 614; Hardy v. Anderson, 241 Minn. 478, 63 N. W. (2d) 814; State v. Becker, 231 Minn. 174, 42 N. W. (2d) 704; Brecht v. Town of Bergen, 182 Minn. 603, 235 N. W. 528.

5. Defendant contends that the damages awarded were so excessive as to indicate passion and prejudice. Punitive damages may be awarded where a defamation of character is published with actual malice and where the publisher has acted with a reckless disregard of the rights of the injured party. Yencho v. Kruly, 158 Minn. 408, 197 N. W. 752; James v. Warter, 156 Minn. 247, 194 N. W. 754; Hrdlicka v. Warner, 144 Minn. 277, 175 N. W. 299; MacInnis v. National Herald

Printing Co., 140 Minn. 171, 167 N. W. 550. Determination of the amount of an award for such damages rests almost exclusively within the province of the jury and its action therein will not be disturbed on appeal, except where the amount awarded is so excessive as to be deemed unreasonable. Smith v. Hubbard, 253 Minn. 215, 91 N. W. (2d) 756; Sweeney v. Meyers, 199 Minn. 21, 270 N. W. 906; Bronson Steel Arch Shoe Co. v. T. K. Kelly Investment Co., 183 Minn. 135, 236 N. W. 204; Krienke v. Citizens National Bank, 182 Minn. 549, 235 N. W. 24. See, Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930; Berg v. St. Paul City Ry. Co., 96 Minn. 513, 105 N. W. 191. Here, where defendant admitted a net worth of $100,000, the award of $7,500 as punitive damages for his publication of the article designed to damage, if not destroy, plaintiff was not so excessive in our opinion as to be unreasonable.

6. However, we are convinced that the award of $12,500 for general damages was excessive. The evidence relating to this issue was rather general and in fact limited to a few incidents which plaintiff outlined as affecting his reputation as well as his peace of mind. In our view of the entire record and the surrounding circumstances, we feel that an award of $5,000 for general or compensatory damages would have amply compensated plaintiff for any loss he has sustained in this respect. Lydiard v. Daily News Co., 110 Minn. 140, 124 N. W. 985. Accordingly, a new trial on the issue of general damages must be ordered, unless within 10 days after the filing of this opinion plaintiff shall file in supreme court a written consent to the reduction of the total verdict to the

sum of $12,500. In the event of compliance with this condition, the order appealed from shall be and is affirmed.

Affirmed on condition plaintiff consent to reduction.

MR. JUSTICE OTIS, having presided at the pre-trial conference, took no part in the consideration or decision of this case.

MR. JUSTICE ROGOSHESKE, not having been a member of the court at the time of the argument and submission, took no part in the consideration or decision of this case.